

1987

# Eldredge Rent A Car v. Taylor D. Carr : Brief of Appellant

Utah Court of Appeals

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Steven Lee Payton; attorney for respondent.

Steven H. Lybbert, Taylor D. Carr; attorneys for appellant.

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**BRIEF**

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IN THE UTAH COURT OF APPEALS

A10

**870562-CA**

**DOCKET NO. 870562-CA**

Plaintiff and  
Respondent,

vs.

TAYLOR D. CARR,

Defendant and  
Appellant.

Case No. 870562-CA

Category 14.b.

**BRIEF OF APPELLANT**

Appeal from the Fifth Judicial Circuit Court,  
Salt Lake County, Murray Department, Small Claims Division  
The Honorable Michael Burton, Circuit Judge

STEVEN H. LYBBERT  
333 North 300 West  
Salt Lake City, Utah 84103

TAYLOR D. CARR  
350 South 400 East, Suite 114  
Salt Lake City, Utah 84111

Attorneys for Appellant

STEVEN LEE PAYTON  
431 South 300 East, Suite 40  
Salt Lake City, Utah 84111

Attorney for Respondent

**PR**

MAR 2 2 1988

IN THE UTAH COURT OF APPEALS

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ELDREDGE RENT A CAR	)	
	)	
Plaintiff and	)	
Respondent,	)	
	)	
vs.	)	Case No. 870562-CA
	)	
TAYLOR D. CARR,	)	
	)	
Defendant and	)	Category 14.b.
Appellant.	)	
	)	

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STEVEN H. LYBBERT  
333 North 300 West  
Salt Lake City, Utah 84103

TAYLOR D. CARR  
350 South 400 East, Suite 114  
Salt Lake City, Utah 84111

Attorneys for Appellant

STEVEN LEE PAYTON  
431 South 300 East, Suite 40  
Salt Lake City, Utah 84111

Attorney for Respondent

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## JURISDICTIONAL STATEMENT AND CASE HISTORY

Jurisdiction of the Court of Appeals is pursuant to Utah Code Ann. § 78-2a-3(2)(c). This appeal is from a final judgment entered in the Fifth Judicial Circuit Court, Murray Department, Small Claims Division, in favor of plaintiff and against defendant for \$933.29 following trial on November 23, 1987.

## STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Whether the trial court committed reversible error when it failed to administer an oath or affirmation to Mr. Eldredge.
2. Whether the court erred in allowing Mr. Eldredge to testify as to the contents of a damage repair estimate. Stated otherwise, the issue is whether there was any admissible evidence as to damages.
3. Whether the court erred when it awarded damages based on the repair estimate alone without evidence as to diminution of value; i.e., whether the court used an erroneous measure of damages.

## STATUTORY PROVISIONS

Utah Code Ann. § 78-4-29. Rules of practice and civil procedure to apply - Exceptions.

" . . . The rules of civil procedure shall apply to actions commenced in circuit courts except insofar as these rules are by their nature clearly inapplicable to circuit courts or proceedings therein."

Utah Rules of Evidence, Rule 101. Scope.

"These rules govern proceedings in the courts of this

State, to the extent and with the exceptions stated in Rule 1101."

Utah Rules of Evidence, Rule 603. Oath or affirmation.

"Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so."

Utah Rules of Evidence, Rule 1101. Applicability of Rules.

"(a) Courts and magistrates. These rules apply to all actions and proceedings in the courts of this state except as otherwise provided in Subdivision (b).

(b) Rules inapplicable. The rules (other than with respect to privileges) do not apply in the following situations:

(1) Preliminary questions of fact which are to be determined under Rule 104(a);

(2) Grand jury proceedings;

(3) Miscellaneous proceedings for extradition, sentencing or granting or revocation of probation, issuance of warrants for arrest, criminal summonses and search warrants and proceedings with respect to release on bail or otherwise;

(4) Contempt proceedings in which the court may act summarily."

#### STATEMENT OF THE CASE

This is an appeal from a judgment in favor of the plaintiff and against defendant Taylor D. Carr entered in the Small Claims Division of the Murray Department of the Fifth Circuit Court. The action was brought to recover for damages to plaintiff's automobile allegedly caused by defendant's negligence.

On February 4 or 5, 1986, the car operated by defendant-appellant Taylor D. Carr collided with an unoccupied

car owned by plaintiff-respondent Eldredge Rent A Car. The collision occurred on Apricot Avenue in Salt Lake City, between Center Street and Main Street.

Eldredge Rent A Car filed a Small Claims Affidavit in the Small Claims Division of the Murray Department of the Salt Lake County Circuit Court, for damage done to the car. The case went to trial on November 23, 1987.

Apricot Avenue runs east and west up a very steep hill. Tr. 8:25-9:4. Witness Lorie Wilkinson Torney testified that on the morning of the collision, Apricot Avenue was covered with a layer of ice and the ice was covered by a light layer of snow. Tr. 9:22-10:12. Ms. Torney testified that on the morning of the collision she was driving plaintiff's car north on Center Street and turned to go east up Apricot. Tr. 9:20-23. She drove about two-thirds of the way up Apricot and realized she was not going to make it to the top of the hill so she pulled as close as she could to the curb and left the car parked on Apricot. Tr. 4:20-5:12. Lori then left the car on Apricot and walked up the hill to her fiance's (now husband's) condominium. Id. By the time she returned to the car with her fiance, Mr. Torney, the collision had occurred. There were no witnesses to the collision except Mr. Carr. Tr. 12:13-17.

Mr. Carr testified that on the morning of the collision he pulled east out of the driveway of his condominium. Almost immediately his car lost traction and, despite keeping his foot on the brake, began to slide backward down Apricot where it sideswiped plaintiff's parked car as it slid past. Tr. 31:10-18.



At trial, after Ms. Torney testified, Mr. Eldredge sought to introduce a damage repair estimate into evidence. Tr. 15:14. The Court interrupted Mr. Eldredge and the following exchange took place:

"THE COURT: Mr. Carr,--I mean, I don't know if you're going to object, but small claims, we usually let hearsay in.

MR. CARR: Well, I--for the record, I will object.

THE COURT: Great.

MR. CARR: Based on the fact that it's hearsay and there's no qualified witness here to testify concerning the estimate.

MR. ELDREDGE: Well, I'm--I can place myself as a qualified witness, because I've done body work for 20--over 20 years, and I was there when he did write the bid and we did discuss it, and as my--my name is on the bottom.

. . . .

THE COURT: I'm going to overrule it, because in my experience, the small claims is a forum where hearsay is allowed, if it appears to be reliable, reliable hearsay." (Emphasis added) Tr. 15:17-16:8.

After overruling the objection, the following exchange took place:

"MR. CARR: I have looked at the pictures and estimates. I can't read the estimate, for the most part. If--can I ask the witness what some of these words are?

THE COURT: That's a good idea. Do you want to be sworn? Do you want him sworn, I mean he can tell us--

MR. CARR: I don't--no, no. I--

THE COURT: He's been here enough that he can tell us the truth." Tr. 18:16-23.

Thereafter, Mr. Eldredge testified as to the contents of the repair estimate prepared by another person whose name was not given. Tr. 18:24-20:18. There was no testimony that the

estimate constituted a reasonable charge for repair of the damages incurred. There was no testimony as to the fair market value of the car at either the time of the collision or thereafter.

Mr. Eldredge also sought to introduce photographs of the car. Mr. Carr objected to introduction of the photographs for lack of foundation. Tr. 22:11-13. The court overruled that objection (Tr. 22:14-17), and then stated:

"And then on the bid, Mr. Carr's going to lodge an objection that it's hearsay, and I think it's overruled because of the forum we're in." Tr. 22:18-20.

At the conclusion of all of the evidence, the court entered judgment in favor of plaintiff and against Mr. Carr for the amount stated on the repair estimate plus a \$25 "damage appraisal" fee, plus costs. Tr. 49:8-51:9. Defendant Carr filed his Notice of Appeal on December 1, 1987.

#### SUMMARY OF ARGUMENT

Defendant-appellant recognizes that the small claims courts were established by the legislature to provide speedy justice to litigants where the amount of money at issue is relatively small. Nevertheless, the small claim courts are divisions of the Circuit Courts and, except as specifically provided otherwise in the Small Claims Court Act, the rules of practice and civil procedure apply to actions in the circuit courts. Utah Code Ann. § 78-4-29; Utah Rules of Civil Procedure, Rule 1(a); Utah Rules of Evidence, Rule 1101(a); Faux v. Mickelsen, 725 P.2d 1372, 1374 (Utah 1986).

In the instant case, the court allowed Mr. Eldredge to testify without being sworn. The court allowed documentary evidence which it acknowledged was hearsay to be admitted into evidence, thereby depriving Carr of any meaningful cross-examination on the issue of the damages sought to be imposed against him. Except for the admission of hearsay documentary evidence, there was no evidence of damages. Finally, apparantly because the matter was tried in the Small Claims division of the Circuit Court, the court expressly declined to hold plaintiff to proof of the proper measure of damages.

The trial court's misunderstanding of the "informal" nature of small claims court procedure resulted in a judgment against defendant Carr despite the lack of admissable evidence as to damages.

#### ARGUMENT

##### A.

#### THE TRIAL COURT ERRED WHEN IT ALLOWED MR. ELDREDGE TO TESTIFY WITHOUT TAKING AN OATH OR AFFIRMATION

With a few exceptions not applicable to this case, the Utah Rules of Evidence apply to proceedings in all of the courts of this State. Utah Rules of Evidence, Rule 101; Utah Rules of Evidence, Rule 1101(a).

Rule 603 of the Utah Rules of Evidence provides that before testifying, every witness shall be required to declare that he will testify truthfully.

In the instant case, Mr. Eldredge was allowed to testify without giving an oath or affirmation that he would testify truthfully. The court recognized its duty to swear in

Mr. Eldredge and asked defendant Carr whether he wished Eldredge to be sworn. When Mr. Carr was caught off guard and indicated some uncertainty (Tr. 18:19-21) the court cut him off and stated: "He's been here enough that he can tell us the truth".

Defendant recognizes that unsworn testimony is not a nullity and that failure to raise an objection to unsworn testimony constitutes a waiver of the irregularity. Larsen v. State, 686 P.2d 583, 587 (Wyo. 1984). In this case, however, the court started to give Carr an opportunity to either insist that Eldredge be sworn or waive the formality, but then cut him off in midsentence and unilaterally determined that Eldredge had "been [in court] enough that he could tell the truth."

Carr neither intentionally nor inadvertently waived his objection to Eldredge testifying without taking an oath or affirmation. He was not given an opportunity to state his preference.<sup>1</sup>

B.

THE TRIAL COURT ERRED WHEN IT ALLOWED A DAMAGE REPAIR  
ESTIMATE PREPARED BY A PERSON NOT PRESENT IN COURT TO  
BE ADMITTED INTO EVIDENCE

Carr raised a timely objection to the introduction into evidence of a damage repair estimate upon which plaintiff relied to establish the damages to his vehicle. Tr. 15:19-23. The

1. The transcript indicates that when asked whether he wanted Eldredge to be sworn, Carr responded: "I don't--no, no. I--". Without hearing the response, who is to say that Carr was not about to say: "I don't know. No, I [want him sworn.]" This obviously requires speculation. The point is, Carr was cut-off and not given an opportunity to complete whatever it was he was going to say.

court acknowledged that the contents of the repair estimate were hearsay but overruled the objection on the stated ground that "the small claims is a forum where hearsay is allowed, if it appears to be reliable, reliable hearsay." Tr. 16:6-8; 22:18-20.

As stated above, the Rules of Evidence apply to proceedings in all of the courts of this State. Defendant Carr recognizes that the small claims courts were established by the legislature "to make it possible to dispose of certain actions in an informal manner from their inception to their end with the sole object of dispensing speedy justice between the parties." Faux v. Mickelsen, 725 P.2d 1372 (Utah 1986). However, the legislature has determined what informalities are permissible and the introduction of evidence that would be inadmissible in any other court is not one of the permitted informalities. The Small Claims Court Act, Utah Code Ann. §§ 78-6-1 et seq., has dispensed with the requirement of formal pleadings, has provided for the acceleration of trial setting, and has dispensed with the need to bring what might, in another court, be construed as a compulsory counterclaim. The Small Court Act contains no provision which can be interpreted as relaxing the rules of evidence.

In the instant case, the hearsay evidence offered by Eldredge and admitted by the court over objection was the only evidence as to damages. Plaintiff needed to prove only two elements to establish its claim--negligence and damages. The only other evidence that tended to establish damages were photographs of plaintiff's car; and there was no testimony that

the damage shown on the photographs was caused by the impact between Carr's car and plaintiff's car.<sup>2</sup>

The introduction of the damage repair estimate deprived Carr of the right to conduct any meaningful cross-examination. The person who prepared the estimate was not present to testify that the estimate was reasonable, or that he in fact repaired the car for the charges stated on the estimate (and not a lesser amount), or to express an opinion that the damages listed on the repair estimate were caused by the collision.

In Sevy v. Utah Farm Bureau Insurance Company, 8 Utah 2d 321, 334 P.2d 554 (1959), the Supreme Court specifically held that it was error for the trial court to admit testimony as to the contents of a written appraisal of repair costs where the witness was not qualified as an expert and did not prepare the appraisal.

Rule 602, Rules of Evidence, provides that a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Even assuming that some relaxation of the Rules of Evidence is permissible in small claims courts, defendant suggests that parties must come to court prepared to present at least some admissible evidence as to the necessary elements of

2. Mr. Eldredge testified that when he leased the car to Lorie Torney it had no damage and when she returned the car it was damaged. Tr. 20:20-22. But Ms. Torney did not testify that there was no other damage done to the car either before or after the collision involving defendant.

the cause of action upon which they seek to recover, or take the risk that appropriate objections will be raised. The valid objective of providing an easy means for plaintiffs to present their cases does not justify the imposition of unwarranted judgments against defendants, no matter how small the amount of money involved.

C.

THE COURT ERRED IN AWARDING DAMAGES WHEN THERE WAS NO EVIDENCE OF THE DIMINUTION OF VALUE OF THE DAMAGED VEHICLE

Generally, the measure of damages to an automobile is (1) the fair market value of the property before being damaged less the fair market value of the property after being damaged, or (2) the reasonable repair cost of the automobile, whichever is less. Sevy v. Utah Farm Bureau Insurance Company, supra, 334 P.2d 554. In the instant case, there was no evidence of the fair market value of plaintiff's car either before or after the accident. Such a measure of damages is sound. A defendant should not be required to pay repair costs if the cost to repair a car is greater than the financial loss sustained by the property owner. A small "parking lot ding" may not result in any decrease in value to a vehicle, but might cost hundreds to repair.

Defendant recognizes that under special circumstances repair cost may be the only evidence of damage to personal property available to a plaintiff. See, e.g., Ault v. Dubois, 739 P.2d 1117 (Utah App. 1987). However, when the personal property is a motor vehicle, and when the plaintiff is in the automobile business as in the instant case, no good reason is

apparent why the plaintiff should not be required to show that diminution in value is greater than the cost of repair before being allowed to recover cost of repair as his damage.

In the instant case, defendant Carr appropriately argued that plaintiff had not proven diminution in value. In response the court stated:

THE COURT: And I just think in this case that Mr. Eldredge has a right, as most of us do, to go out and repair his car . . . . And I understand your legal theory, that he has to prove value before and value after, and I understand your point that the Court here ought to be bound to that measure of proof. I'm finding specifically for the small claims proceedings, that Mr. Eldredge has proved a fair and reasonable loss, irrespective of what All [sic] v. Duboise may show in terms of esoteric measures of damage, and I would be happy to say that for the record." (Emphasis added) Tr. 50:24-51:9

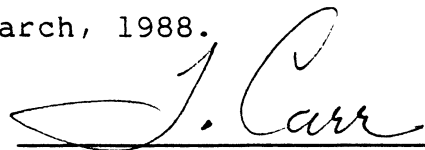
While the legislature has relaxed some procedural requirements in small claims court actions, the Small Claims Court Act contains nothing modifying the rules of substantive law, including the rules relating to measure of damages.



CONCLUSION

Based on all of the above, and on the record below, defendant respectfully submits that the judgment entered in the trial court was based solely on inadmissible evidence, and that the evidence submitted was insufficient to support a finding of damages. The trial court's judgment should be reversed and judgment should be entered for defendant because there was no evidence of damages.

Dated this 15 day of March, 1988.

A handwritten signature in cursive script, appearing to read "T. Carr", written over a horizontal line.

Taylor D. Carr  
Steven H. Lybbert  
Attorneys for Defendant-  
Appellant

CERTIFICATE OF SERVICE

I certify that on the 15 day of March, 1988, I hand delivered four (4) copies of the foregoing Brief of Appellant to Steven Lee Payton, Esq., Attorney for Respondent, at 431 South 300 East, Suite 40, Salt Lake City, Utah.

A handwritten signature in cursive script, appearing to read "T. Carr", written over a horizontal line.

Taylor D. Carr

ELDRIDGE RENT A CAR	)	
	)	
Plaintiff and	)	
Respondent,	)	ADDENDUM TO
	)	APPELLANT'S BRIEF
vs.	)	
	)	Case No. 870562-CA
TAYLOR D. CARR,	)	
	)	
Defendant and	)	
Appellant.	)	

1. Small Claims Court Judgment.
2. Transcript of Trial (pages cited in brief).

# Circuit Court, State of Utah

SALT LAKE COUNTY, MURRAY DEPARTMENT

EL DREDGE RENT A CAR

Plaintiff

vs

TAYLOR D. CARR

1770 Apricot Ave

Salt Lake City UT

Defendant

SMALL CLAIMS

JUDGMENT

Case No. 87-003264-00

This matter came before the court for hearing on the affidavit of plaintiff, and the defendant has been served with the affidavit of plaintiff and order to defendant, and return of service has been made. The following parties appeared at the hearing:

- ☐ Plaintiff Only. The defendant failed to appear.  
☐ Defendant Only. The plaintiff failed to appear.  
☒ Both plaintiff and defendant appeared and presented evidence.

Court orders judgment as follows: ☐ for plaintiff ☐ for defendant.

\$ 262.64 4108.54 Principal

\$ 24.75 21.75 Court costs, and

\$ 287.39 4155.29 TOTAL JUDGMENT 4155.29

- ☐ No cause of action.  
☐ Dismissed with/without prejudice.

DATED November 23, 19 87  
with interest on the total judgment at 12% per annum from the date of this judgment until paid.

JUDGE

☐ Both Plaintiff and Defendant received copies of the Judgment at Hearing \_\_\_\_\_  
Clerk

## TO THE DEFENDANT ONLY:

If the above judgment was granted in favor of the plaintiff, you now have a judgment against you in the Circuit Court in the amount specified above. If you are dissatisfied with this judgment, you have FIVE (5) days from receipt of this notice to appeal the case to the Court of Appeals.

## TO THE PLAINTIFF:

You should mail a copy of this notice of judgment to the defendant IMMEDIATELY. The defendant has five days from receipt of the notice to appeal the case. You must complete the mailing certificate and file the original of this judgment with the court before you can proceed with any further court action.

I hereby certify that I mailed a copy of this judgment, postage prepaid, addressed to the above named defendant(s) at \_\_\_\_\_

Address & Zip Code

Dated \_\_\_\_\_

SIGNATURE

1 THE COURT: Mr. Carr, any questions of--  
2 And your name today is?  
3 MR. CARR: Yes, your Honor.  
4 THE WITNESS: Lorie Torney.  
5 THE COURT: Torney?  
6 THE WITNESS: T-o-r-n-e-y.  
7 THE COURT: All right.  
8 MR. CARR: I'm not sure of your procedure here, your  
9 Honor. Do I stand when I cross-examine witnesses?  
10 THE COURT: Do whatever you like. If you want to  
11 stand and pull that out and look real good, or you can just  
12 sit down.  
13 CROSS-EXAMINATION  
14 BY MR. CARR:  
15 Q Lorie, you and I were neighbors, to a certain  
16 extent, weren't we?  
17 A Uh huh.  
18 Q And how long had you been associated with Dick Torney,  
19 as he lived at that condominium address where we live?  
20 A Two years.  
21 Q So you were well familiar with the situation--  
22 A Uh huh.  
23 Q --of that area?  
24 A I worked there for a year, so, uh huh.  
25 Q Now, Apricot Avenue runs east and west; is that

1 correct?

2 A Yes.

3 Q And would you describe it as a very steep hill?

4 A Yes.

5 Q Would you describe it with respect to other street,  
6 highways of Salt Lake City as a very narrow street?

7 A No. I don't think so. I think it's an average  
8 street.

9 Q Do you think that Apricot Avenue is wide enough so  
10 that you could have cars parked on each curb, plus have  
11 vehicular traffic pass each other going east and west?

12 A Not--not two cars, no.

13 Q All right. So, there's not room to park cars on each  
14 side, plus have vehicular traffic passing?

15 A Not on both sides, but there was no car on the  
16 other side.

17 Q Now, on that particular morning, February 4th, 1986,  
18 as you turned on to Apricot from Center Street, which direction  
19 had you been coming from on Center Street?

20 A I'd been going north, I'd been coming from the  
21 south going north.

22 Q Okay. Describe the road condition on Apricot, as you  
23 turned to go east, up the hill?

24 A It was snowy. It was snowy.

25 Q Was it deep snow?

1 THE COURT: For today, I am.

2 MR. ELDREDGE: Okay. Should we just call her up and  
3 have her testify, then?

4 THE COURT: That's a good idea.

5 MR. ELDREDGE: Can you come up and testify, please,  
6 Lorie?

7 LORIE WILKINSON,  
8 called as a witness by and on behalf of the plaintiff in this  
9 matter, after having been first duly sworn, was examined and  
10 testified as follows:

11 THE COURT: If you'll take the stand right here.

12 And then, Mr. Eldredge, just ask her a couple of  
13 questions, you know, as much as you think, and then Mr. Carr  
14 can ask her some.

15 DIRECT EXAMINATION

16 BY MR. ELDREDGE:

17 Q Lorie, can you tell us--tell the Judge, please, what  
18 happened on or about February 4th, 1986, when the car was  
19 damaged on Apricot Avenue?

20 A Sure. I was driving east on Apricot Avenue, and I  
21 got about three--well, let's see, about two-thirds of the way  
22 up the street and it was a snowy day, and I realized that I  
23 could not make it all the way up, so...

24 THE COURT: What day was this? This is quite a  
25 while ago then, huh?

1 THE WITNESS: Uh huh.

2 THE COURT: February 4th?

3 THE WITNESS: Uh huh. And so I got about two-thirds  
4 of the way up the street, and realized that I was not going to  
5 make it to the top of the--to the top of the hill, so I pulled  
6 over as far as I could, there was a snowbank probably about  
7 three feet to the curb, two feet to the curb, so I kinda skid  
8 into the snowbank. And I did not feel confident enough to back  
9 the car down the hill on the snowy day, 'cause I didn't want to  
10 slide out into the street. So, I thought that I'd walk up the  
11 hill to get my husband, which was my fiance at the time, 'cause  
12 I was taking him to the airport.

13 So, I went in the house, got him, I probably wasn't  
14 parked there more than four minutes, we came out. And in the  
15 meantime, Mr. Carr had pulled--started driving down the street  
16 and had slid into the car.

17 THE COURT: Well, maybe so I'll understand, you were  
18 in the house four minutes--

19 THE WITNESS: Uh huh.

20 THE COURT: --and then when you come back, what do  
21 you see?

22 THE WITNESS: That he had slid into the car.

23 THE COURT: I mean, how do you know it's him and  
24 those things?

25 THE WITNESS: 'Cause he was there, his car was--



1 when you came out?

2 A Uh huh, sideways.

3 Q When you say sideways, what do you mean by that?

4 A Well, I mean, you--it was obvious that you were  
5 coming down the hill.

6 Q There's no doubt I came down the hill; but do you  
7 know whether I came down the hill frontwards or backwards?

8 A Well, it appeared to me that you came down  
9 backwards.

10 Q Yes.

11 A I mean--no, that you came down frontwards, I mean.  
12 I mean, it appeared to me that you came down frontwards.

13 Q But you--you didn't see it happen? You didn't see  
14 me come down there?

15 A No. I was not, I was in the house, so I did not.

16 Q Mr. Torney didn't see me come down the hill?

17 A No.

18 Q Okay. Now, with respect to our brief conversation  
19 on that day, it was not a, what you would describe as an  
20 argument of any kind, would you?

21 A No. No.

22 Q It was something like, well, we know each other, and  
23 we'll take care of our own problem; wasn't it something to that  
24 effect?

25 A It was, we know each other, we won't--we don't need

1 condominium complex, located in this approximate position. She  
2 pulled off Center Street, got a couple of car lengths or more,  
3 maybe three car lengths up the road, and then came--became  
4 completely tractionless.

5 Now, at that point, she knew the condition of the  
6 road, she knew that it wasn't just a white powder over the  
7 concrete. Instead of backing--simply backing off on to Center  
8 Street, to bring her car out of the position of danger, she  
9 left it there.

10 I came out of my place to go to work, and as usual,  
11 I pulled out here, saw the light, white covering of snow and  
12 drove in this direction. I didn't get more than straightened  
13 out, before I became completely tractionless, myself. At that  
14 point, there was nothing I could do, my car began sliding  
15 backwards. All I could do at that point is hold onto the  
16 wheel, put my foot on the brake and say, why couldn't she  
17 move that car out of the way, as I see it coming up, behind  
18 me.

19 The right front of my car struck the left front corner  
20 of her car, in a position similar to this, as I slid backwards.  
21 There was absolutely no way I could have avoided that. Now--

22 THE COURT: Excuse me. So, you're saying that your  
23 vehicle slid in a straight, unimpeded straight free fall?

24 MR. CARR: Basically straight, slightly tilted toward  
25 the right.

1           A     Okay. It was on the driver's side, okay? On the  
2 left side.

3           Q     Are you really sure about that?

4           A     As I recall.

5           Q     Okay. Can you describe--

6           MR. CARR: Well, I guess I can do this better with  
7 another witness, your Honor. That's all I have for this  
8 witness.

9           THE COURT: Before you go, anything else,  
10 Mr. Eldredge?

11          MR. ELDREDGE: Not right now.

12          THE COURT: Thank you. Why don't you step down.

13          THE WITNESS: Okay.

14          MR. ELDREDGE: Okay. We've got an estimate here from  
15 an independent damage appraiser that shows the damage to our  
16 car, this is written by--

17          THE COURT: Mr. Carr, I mean, I don't know if you're  
18 going to object, but small claims, we usually let hearsay in.

19          MR. CARR: Well, I--for the record, I will object.

20          THE COURT: Great.

21          MR. CARR: Based on the fact that it's hearsay and  
22 there's no qualified witness here to testify concerning the  
23 estimate.

24          MR. ELDREDGE: Well, I'm--I can place myself as a  
25 qualified witness, because I've done body work for 20--over

1 THE COURT: Now, on the appraisal, I mean, you just  
2 say, you know, you talked to him, showed him the car and that's  
3 hearsay, but we have to let them in in small claims, because  
4 that's why we have the system.

5 Your witness is back?

6 MRS. TORNEY: They sent him to 7-Eleven, they wouldn't  
7 let him use the phone out here because they didn't have a pay  
8 phone, so they sent him to the 7-Eleven. He needed to make a  
9 conference call real quick, so...

10 THE COURT: What a lucky guy.

11 MRS. TORNEY: Pardon?

12 THE COURT: So, he'll be back in a minute?

13 MRS. TORNEY: I guess, yeah.

14 THE COURT: Do you want to turn it off for a minute?

15 (Off the record.)

16 MR. CARR: I have looked at the pictures and estimates.  
17 I can't read the estimate, for the most part. If--can I ask  
18 the witness what some of these words are?

19 THE COURT: That's a good idea. Do you want to be  
20 sworn? Do you want him sworn, I mean he can tell us--

21 MR. CARR: I don't--no, no. I--

22 THE COURT: He's been here enough that he can tell  
23 us the truth.

24 MR. CARR: What's this last item down here?

25 MR. ELDREDGE: That's remove and replace, that would

1 MR. ELDREDGE: 2-4 of '86--

2 THE COURT: Okay.

3 MR. ELDREDGE: --is when he came out and wrote a bid  
4 on the car.

5 THE COURT: Okay. And who took the pictures?

6 MR. ELDREDGE: Jim Carey, the man who wrote the bid.

7 THE COURT: And do they--do they--as you look at  
8 them, do they reflect the damage you saw on the day before?

9 MR. ELDREDGE: Yes.

10 THE COURT: Okay.

11 MR. CARR: Your Honor, I object to the pictures on the  
12 same basis that I do to the estimate, on the basis of fact  
13 that there's a lack of foundation.

14 THE COURT: Well, clearly, on the pictures, there  
15 appears to be a foundation, he says that they reflect  
16 accurately what he saw. I think that there's adequate  
17 foundation.

18 And then on the bid, Mr. Carr's going to lodge an  
19 objection that it's hearsay, and I think it's overruled  
20 because of the forum we're in.

21 MR. ELDREDGE: Okay.

22 THE COURT: So, I can see those.

23 You only had one bid?

24 MR. ELDREDGE: Yes. The reason we had one bid, is  
25 because at one time, like I testified, we thought there was

1 Mario Andretti, or somebody of that nature. And once I got  
2 into that--

3 THE COURT: Or Paul Newman.

4 MR. CARR: --uncontrollable slide, there was nothing  
5 I could do, and I'm just urging this Court to find that this  
6 in fact was an unavoidable accident.

7 THE COURT: Fair enough.

8 Well, you do make a convincing case, Mr. Carr, but  
9 here's how I see that happen. I see a car in essentially the  
10 same kind of situation coming up the hill and they're able to  
11 stop, and not go down. Now, I don't know what it was in your  
12 situation that made it different. You've indicated you don't  
13 know, and I have no feel, but as I see the reasonable person on  
14 that road, they could have controlled that stop. And for that  
15 reason, I think then that your conduct did dip--as you say,  
16 dip below the standard of a reasonable man. I think once you  
17 drive it, you've got to be able to control it.

18 Another driver in a very--in exactly the same situation  
19 was able to stop the car and not move it further down the  
20 hill, and I think that you're held to that standard. I find  
21 you at fault.

22 I think the damages that Mr. Eldredge has presented  
23 are appropriate, except for the \$54. I reduce his base amount  
24 then by that 54. I find him in at \$908.54, the cost of the  
25 repair plus the appraisal cost, the \$24.75 for Court costs, and



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1 A There was deep snow to the side of the hill, there  
2 was light covered snow on the road.

3 Q There was a light-white covering of snow over the  
4 road--

5 A Uh huh.

6 Q --was there not?

7 A Yes.

8 Q And underneath that light covering of snow, there was  
9 some real slick black ice, wasn't there?

10 A Uh huh. It was slick.

11 Q You have to answer yes, please.

12 A Yes.

13 Q Thank you. In fact, when Mr. Torney came out of--  
14 of the condominium and stepped upon the road--

15 A He slipped.

16 Q --he slipped and slid all the way down Apricot,  
17 didn't he?

18 A Uh huh. Yeah, he did. Yes.

19 Q Now--

20 THE COURT: You didn't laugh, did you?

21 THE WITNESS: Uh huh.

22 THE COURT: Did you?

23 MR. CARR: I certainly didn't laugh, your Honor.

24 THE COURT: Well, no. You're not in the mood to,  
25 but--and she's not--she shouldn't have. But--

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1 20 years, and I was there when he did write the bid and we did  
2 discuss it, and as my--my name is on the bottom--

3 THE COURT: He wants--he wants to make his objection  
4 for the record.

5 MR. ELDREDGE: Okay.

6 THE COURT: I'm going to overrule it, because in my  
7 experience, the small claims is a forum where hearsay is allowed,  
8 if it appears to be reliable, reliable hearsay.

9 MR. ELDREDGE: This is written by Jim Carey's damage  
10 auto appraisal service, he writes for Farmers' Insurance when  
11 they're too busy, and also he does write for several other  
12 insurance companies. These are pictures that he took on the  
13 date of the estimate here. Shall I show these to Mr. Carr or  
14 to yourself, or whomever?

15 THE COURT: It's up to you.

16 MR. ELDREDGE: Who would like to see them?

17 MR. CARR: I'd like to see them.

18 MR. ELDREDGE: Okay.

19 MR. CARR: Thank you.

20 MR. ELDREDGE: I get a chuckle every time I come in  
21 here.

22 THE COURT: The theory behind it, Mr. Eldredge, if  
23 you're going to offer them to be admitted, then he should look  
24 at them first, and then on pictures, you have to lay some  
25 foundation as to whether or not the car--the pictures reflect



1 the damage justice.

2 MR. CARR: And you have charged three hours for the  
3 left rear door?

4 MR. ELDREDGE: That's correct. That's damage along  
5 the side here.

6 MR. CARR: Does that show that in the picture?

7 MR. ELDREDGE: I think it probably shows that there's  
8 a crease right through here, that's right through there. You  
9 can see there's a concave right above this line there.

10 MR. CARR: Okay. And you've charged three hours for  
11 that? And you've--

12 MR. ELDREDGE: That's correct.

13 MR. CARR: You allege that that was done in this  
14 incident?

15 MR. ELDREDGE: That's correct.

16 MR. CARR: Uh huh.

17 MR. ELDREDGE: That was down the whole side of the  
18 car.

19 MR. CARR: But you didn't see the incident, did you?

20 MR. ELDREDGE: No, I did not. All's I know is that  
21 when the car went out, there was no damage on the car. When  
22 the car come back, this is the damage that was on the car. And  
23 as far as the tires on the car, the car when it went out on  
24 rent, had 8,000 miles, so the tires, I would think would be  
25 fairly good. The car was a new car.

1 I add them up, I get 933.29.

2 Now, Mr. Eldredge, my impression is, given Mr. Carr's--  
3 and I'm not--but his experience, he may well appeal this, I'm  
4 not arguing he will or won't, but you're both going to receive  
5 copies of the judgment, and then if he hasn't appealed within  
6 five days, he knows then the judgment is final, so I would  
7 hold getting too excited until you saw what happened within  
8 the five-day period. Okay?

9 MR. CARR: On the record, your Honor, may I ask you to  
10 respond to my objections to the--

11 THE COURT: Yes. I think that's important for the  
12 record. Let me just, for the record, I have five pictures  
13 presented by the defendant which are, what you claim the position  
14 of the car, and I've heard testimony that's different, and I  
15 can make some facts on that, and then I see the pictures on the  
16 damage. I'm going to keep them all, not--just when I see an  
17 attorney who has done as much preparation, I sense maybe you  
18 want to look at an appeal. So, ask your questions, and then I  
19 can make my findings for you.

20 MR. CARR: My question is, what is your finding with  
21 respect to my objection to the fact that they did not prove--

22 THE COURT: Prove diminution of value?

23 MR. CARR: Diminution of value, yeah.

24 THE COURT: And I just think in this case that  
25 Mr. Eldredge has a right, as most of us do, to go out and

1 repair his car, and that you caused the damage that he had  
2 repaired at a fair and reasonable price. And I understand  
3 your legal theory, that he has to prove value before and value  
4 after, and I understand your point that the Court here ought  
5 to be bound to that measure of proof. I'm finding specifically  
6 for the small claims proceedings, that Mr. Eldredge has proved  
7 a fair and reasonable loss, irrespective of what All vs.  
8 Duboise may show in terms of esoteric measures of damage, and  
9 I would be happy to say that for the record.

10 MR. CARR: Thank you. Where do we order the  
11 transcript?

12 THE COURT: And I'm not sure on how an appeal works,  
13 but can you check with Dorothy, and if Dorothy can't answer  
14 you, Jay can, Jay or Jerry, they're both behind there, and  
15 they'll lay out exactly how you do it.

16 MR. CARR: Thank you.

17 THE COURT: Thank you all for your participation.

18 MR. ELDREDGE: Thank you, your Honor.

19 (Whereupon, this hearing was concluded.)  
20  
21

22 \* \* \*  
23  
24  
25